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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 1088 109

CHARLES LALOR BURDICK and CHEMICAL BANK & TRUST COMPANY, Trustees of the Last Will and Testament of Willard A. Lalor, deceased,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to Review a Decision of the United States Circuit Court of Appeals, Second Circuit, and Supporting Brief

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Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition of Charles Lalor Burdick and Chemical Bank & Trust Company, Trustees of the Last Will and Testament of Willard A. Lalor, Deceased, for Writ of Certiorari to review a decision of the United States Circuit Court of Appeals, Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Charles Lalor Burdick and Chemical Bank & Trust Company, Trustees of the Will of Willard A. Lalor, deceased, respectfully show to the Court as follows:

Opinions Below

The opinion of the United States Board of Tax Appeals is reported at 40 B. T. A. 1040 and is produced in full in

the Record at pages 24-32. The United States Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals in an opinion reported at 117 Fed. (2d) 972. The decision of the Circuit Court of Appeals was handed down on February 27, 1941.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347).

Question Presented

The question is whether two legacies stated in a Will as given and bequeathed to the Trustees of such educational institutions as testator's sister and nephew respectively might select, with the proviso that if they should fail to designate within a year after probate the particular institution or institutions within such restricted class, the legacies should lapse and form part of the residue, the beneficiaries of which were private, are deductible from the gross estate, among other surrounding circumstances where a corporate Foundation concededly charitable and educational within the meaning of Section 303(a)(3) of the Revenue Act of 1926, as amended, was so designated within less than a year after probate, and where payment of the legacies was made by the Executors to the Trustees of such corporate Foundation.

Statute and Regulations Involved

The Revenue Act of 1926 (44 Stat. 9, ch. 27), as amended, provides in part as follows:

"Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a citizen or resident of the United States, by deducting from the value of the gross estate—

* * * * * * *

(3) The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * * no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, * * * but only if such contributions or gifts are to be used by such trustee or trustees * * * exclusively for religious, charitable, scientific, literary, or educational purposes * * *."

Regulations 80 (1937 Edition) provides in part as follows:

"Art. 44. *Transfers for public, charitable, religious, etc., uses.*—Deduction may be taken of the value of all property transferred by will or by the decedent in his lifetime not to exceed the value of the transferred property required to be included in the gross estate if in either case the property was transferred * * * (2) to or for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * * if no part of the net earnings of the corporation or association inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation; or (3) to a trustee or trustees, * * * if such transfers, legacies, bequests, or devises are to be used by such trustee,

trustees, * * * exclusively for religious, charitable, scientific, literary, or educational purposes * * *."

"Art. 47. *Conditional bequests.*—If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

Statement of Case

The relevant facts, as stipulated by the parties (R. 69-92) and as found by the Board of Tax Appeals (R. 25-29), may be summarized as follows:

Charles Lalor Burdick and Chemical Bank & Trust Company, the petitioners, are the Trustees of the Will of Willard A. Lalor, who died a resident of the District of Columbia on October 9, 1934. He had inherited a substantial part of his fortune from a brother, John Charles Lalor, a distinguished chemist, as a memorial to whom he was interested in organizing or endowing an enterprise for chemical research. He discussed plans for its establishment with his sister, Anna Lalor Burdick, and with her son, Charles Lalor Burdick, also a distinguished chemist.

To effect his desires, he executed a Will in which a legacy of $100,000 was bequeathed "to the Trustees of

such educational institution" as his sister might select, and a legacy of $300,000 to "the Trustees of such educational institution" as his nephew might select.

The Will provided among other things for written designation by his sister and his nephew respectively, of the particular institution or institutions within such restricted educational class to the Trustees of which the legacies bequeathed should be paid, but added a proviso as to each that in the event such designation should not be received within one year after probate of the Will, the legacy should lapse and form part of the residue. The beneficiaries of the residuary clause were individuals.

After executing the Will the testator had numerous discussions with his sister and his nephew as to the legacies, and both prior and subsequent to his death the sister and the nephew discussed the matter with heads of leading universities and other prominent educators, with a view to determining the most practicable manner of effectuating the testator's wishes and intentions with respect to the bequests. At the time of his death on October 9, 1934, however, no definite choice had been reached, nor any designation made, either by the sister or the nephew, of a particular institution or institutions.

On August 27, 1935, The Lalor Foundation, Inc., was incorporated in Delaware, under the management of Trustees, as recipient of the legacies.

On October 14, 1935, less than a year after probate of the Will, the sister and the nephew gave the Executors written notice of their designation of said The Lalor Foundation, Inc., as the particular "educational institution", among the class which the Will made the object of such legacies, to the Trustees of which the legacies should be paid.

The Federal Estate Tax was not the subject of a 90-day letter until November 4, 1937, over two years later.

Such payment, aggregating $400,000, was paid accordingly by the Executors to the Trustees of The Lalor Foundation, Inc., and on or about March 4, 1936, the Executors' final account showing such payment was filed and on April 10, 1936 was duly approved and passed.

The Lalor Foundation, Inc., concededly was organized and is operated exclusively for scientific and educational purposes, no part of its net earnings inures to the benefit of any private stockholder or individual, and it carries on no propaganda and does not attempt to influence legislation.

In their Federal Estate Tax Return, which on October 8, 1935, had been filed in the Office of the Collector of Internal Revenue for the Second New York District, the Executors had deducted from the amount of the gross estate such sum of $400,000 paid to The Lalor Foundation, Inc., as a charitable bequest or legacy by the testator.

Such fund is hereinafter described as the "legacy".

On November 4, 1937, the Commissioner of Internal Revenue mailed a deficiency notice among other things disallowing such $400,000 deduction. On or about January 26, 1938, and within the ninety-day period prescribed by statute, the Executors filed a petition with the United States Board of Tax Appeals to review the Commissioner's determination. In accordance with the opinion of the Board promulgated on December 7, 1939, a decision and order was made and entered on January 8, 1940, sustaining his disallowance of the deduction and fixing an Estate Tax deficiency of $148,594.52.

Such amount of deficiency tax resulted almost entirely from the disallowance of the deduction from the value of

the gross estate of the $400,000 legacy paid by the Executors to The Lalor Foundation, Inc., as aforesaid. Included in this amount, however, were certain additional items, but the only item which was the subject of review by the Circuit Court of Appeals upon the petitioners' appeal to that Court was the said $400,000 paid to The Lalor Foundation, Inc.

The errors assigned and relied upon on the petitioners' appeal from the Board of Tax Appeals to the Circuit Court of Appeals are set forth in detail at pages 49 to 54 of the Record.

Before the Circuit Court of Appeals it was the petitioners' contention, among others, that the provision in the Will that the legacy should lapse if a particular charity should not be designated within the prescribed period should not defeat the right to the deduction claimed, since payment of the legacy was made to an acknowledged charity, designation of which was made within the period limited by the Will and within the period limited by reasonable implication in the first paragraph of Article 47 of Regulations 80.

Not only, however, did the Circuit Court's opinion erroneously fail to sustain or consider such contention, but the Circuit Court based its decision substantially upon an erroneous application and construction of Article 47's second paragraph, which the Court stated to be the law controlling the situation.

Specifications of Error

(1) The Circuit Court of Appeals erred in holding and deciding that the sum of $400,000 paid by the Executors of the testator's Will to The Lalor Foundation, Inc., was

not deductible from the value of the testator's gross estate as a legacy bequeathed by the testator in Article "THIRD" of his Will to a charitable, scientific or educational corporation within the purview of Section 303(a)(3) of the Revenue Act of 1926, as amended.

(2) The Circuit Court of Appeals erred in failing to hold and decide that the sum of $400,000 paid by the Executors of the testator's Will to The Lalor Foundation, Inc., was deductible from the value of the testator's gross estate as a legacy bequeathed by the testator in Article "THIRD" of his Will to a charitable, scientific or educational corporation within the purview of Section 303(a)(3) of the Revenue Act of 1926, as amended.

(3) The Circuit Court of Appeals erred in holding and deciding that the second paragraph of Article 47 of Regulations 80 is applicable to, and in construing said paragraph as controlling adversely to the petitioners upon, the charitable legacy of $400,000 made in Article "THIRD" of the testator's Will.

(4) The Circuit Court of Appeals erred in failing to hold and decide that the first paragraph of Article 47 of Regulations 80 is applicable to, and controlling in petitioners' favor upon, the charitable legacy of $400,000 made in Article "THIRD" of the testator's Will.

(5) The Circuit Court of Appeals erred in failing to hold and decide that the charitable legacy of $400,000 made in Article "THIRD" of the testator's Will was a legacy, the transfer of which, within the purview of the first paragraph of Article 47 of Regulations 80, was "dependent upon the performance of some act or the happening of some event in order to become effective", to wit, the

designation by the testator's sister and nephew respectively, in the period and manner set forth in Article "THIRD" of the testator's Will, of the particular educational institution within such class to the Trustees of which the testator gave and bequeathed such legacy; and that such designation having taken place, the deduction from the value of the testator's gross estate of said $400,000 paid by his Executors to The Lalor Foundation, Inc., should have been allowed under said first paragraph of Article 47.

(6) The Circuit Court of Appeals erred in failing to hold and decide that the period of time limited in Article "THIRD" of the testator's Will for the making of the aforesaid designation more fully described in Assignment "(5)" hereof was a reasonable period within the meaning of and in compliance with the first paragraph of Article 47 of Regulations 80.

(7) The Circuit Court of Appeals erred in holding and deciding in effect that the right to a deduction from the value of the testator's gross estate of the amount of the legacy provided for in Article "THIRD" of his Will was defeated *ipso facto* by the provision that, in the event designation of the particular educational institution to the Trustees of which such legacy was to be paid should not be made within the time and within the manner prescribed, it should lapse and form part of the residuary estate, which by the provisions of Article "FIFTH" of the Will was left in trust for the benefit of private individuals.

(8) The Circuit Court of Appeals erred in holding and deciding in effect that the right to a deduction from the value of the testator's gross estate of the amount of the legacy provided for in Article "THIRD" of the testator's Will was defeated by a possibility, arising from the pro-

vision of Article "THIRD" more fully described in Assignment "(7)", that such legacy might have lapsed and thereupon might have passed to private uses, notwithstanding the remoteness of such possibility under the circumstances involved, and notwithstanding that such possibility was precluded by the designation and payment actually made.

(9) The Circuit Court of Appeals erred in affirming, and in failing to reverse, the decision of the United States Board of Tax Appeals determining a deficiency in the amount of the Federal Estate Tax on the testator's estate resulting from the disallowance of the deduction claimed by the Executors in respect of the legacy to The Lalor Foundation, Inc.

Reasons Why Writ Should Be Granted

(1) The decision of the Circuit Court of Appeals, in its application and construction of the second paragraph of Treasury Regulations 80, Article 47, is in substantial conflict with another Circuit or Circuits.

(2) The decision of the Circuit Court of Appeals is in substantial conflict with decisions of this Court holding that tax deduction provisions as to charitable legacies should be construed not narrowly but liberally.

(3) The decision of the Circuit Court of Appeals is also in conflict with the policy of this Court on the question of the certainty or uncertainty of charitable legacies, and the important question presented in this case should be passed upon by this Court, and in the favorable light of such policy.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari may issue out of and under the seal

of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the Court to certify and send to this Court on a day designated for its review and determination a full and complete transcript of the record and full proceedings in said Circuit Court of Appeals had in the case Numbered 57, and entitled, "Charles Lalor Burdick and Chemical Bank & Trust Company, Trustees of the Last Will and Testament of Willard A. Lalor, deceased, Petitioners, against Commissioner of Internal Revenue, Respondent"; to the end that said cause may be reviewed and determined by this Court as provided by law, that the determination of the United States Circuit Court of Appeals for the Second Circuit herein may be reversed, and that your petitioners may have such other and further relief as may be just.

Dated: New York, N. Y., May 26, 1941.

CHARLES LALOR BURDICK and CHEMICAL BANK & TRUST COMPANY, Trustees of the Last Will and Testament of Willard A. Lalor, Deceased,

Petitioners.

TOWNSEND & LEWIS,
Attorneys for Petitioners,
Office and P. O. Address,
120 Broadway,
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DALLAS S. TOWNSEND,
GARDNER D. HOWIE,
RALPH M. JERSKEY,
Of Counsel.

State of New York, }
County of New York, } ss.:

DALLAS S. TOWNSEND, being duly sworn according to law, deposes and says that he is one of the attorneys for the petitioners, that he prepared the foregoing petition, and that the facts therein stated are true to the best of his information and belief.

DALLAS S. TOWNSEND.

Subscribed and sworn to before me }
this 26th day of May, 1941. }

MERRILLE T. MOREHOUSE
Notary Public Bronx Co. No. 158, Reg. No. 151-M-42
Cert. filed in N. Y. Co. No. 888, Reg. No. 2-M-547
Commission expires March 30, 1942

BRIEF IN SUPPORT OF PETITION

POINT I

The decision below in the Second Circuit is in substantial conflict with another Circuit or Circuits.

The Circuit Court erroneously declared the second paragraph of Article 47 of Regulations 80, which is printed in the foregoing petition at page 4, to control the case.

The Circuit Court declared (p. 974):

> "The situation comes within the second paragraph of T. R. 80, Art. 47 providing that if the gift may be diverted in whole or in part by the exercise of a power by the legatee, devisee, donee or trustee to a use or purpose which would have made it not deductible had the testator so provided directly in his will the 'deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.' This regulation has long been in effect and must be taken to have been approved by Congress since it has reenacted the deduction provisions of the statute without changing the effect of the regulation. *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 59 S. Ct. 423, 83 L. Ed. 536. It stands as the law which controls the present situation."

The Court clearly misconstrued the paragraph, which in terms as well as reasonable intendment applies to a power in the transferee of a fund, whether such transfer be by legacy, devise, in trust, or by gift, including *inter vivos* gifts of a testamentary character. The purpose of the paragraph is to preclude deduction where the trans-

feree has power to use the transferred property for a non-charitable object and thus divert it to a non-charitable use.

This reflects the purpose of Section 303(a)(3), which is printed in the foregoing petition at page 3.

Neither the testator's sister nor his nephew was a transferee of the $400,000 fund in this case. Each was merely possessed of a power of selection, designation or appointment.

In *Levey* v. *Smith* (C. C. A. 7th), 103 Fed. (2d) 643, in which this Court denied certiorari in 308 U. S. 578, a correct application is made of the rule in respect of a transferee's power to use a fund for a non-charitable use or purpose. That case involved a testamentary transfer of a remainder to a fraternal lodge, to which Section 303(a)(3) was likewise applicable. Its use of the fund was not limited by the testator to a charitable object, and the fact was shown that the lodge had both charitable and non-charitable functions. The Court therefore denied a deduction, holding that the executrix could be entitled to it only if the fund was to be used by the lodge solely for charitable purposes and could not be diverted by the legatee lodge to its private purposes.

The Court declared (p. 645), quoting in part from Section 303(a)(3):

> "And our inquiry actually reduces to determining (1) what is meant by the requirement that bequests are deductible 'only if such contributions or gifts are to be used' by the donee 'exclusively for religious, charitable, * * * or educational purposes,' * * *."

Obviously this language had reference to such power of the transferee of the fund, the lodge, to use it for and divert it to a non-charitable use.

So in the present case any question under the second paragraph of Article 47 of power to use the Lalor Fund for, and divert it to, a non-charitable use is a question appertaining not to those possessed of power to designate the particular transferee, but to the transferee itself, which here, unlike the lodge in the *Levey* case, exercises functions exclusively charitable.

In *Brown, Administrator* v. *Commissioner* (C. C. A. 3d), 50 Fed. (2d) 842, a trust deed provided for the remainder of a trust fund to be distributed upon the grantor's death as the trustees "may, in the exercise of their sole and uncontrolled judgment, deem to be wise and best, bearing in mind the ideals of said settlor * * * and * * * the ideas * * * as expressed by him from time to time." His charitable ideals and ideas were disclosed in various conversations and were held to show a charitable intent.

Although it is not mentioned in the opinion, examination of the briefs of *Brown* and the *Commissioner* shows it was conceded that the deed of trust did not restrict the discretion of the trustees to make distribution to charitable purposes and that under power so to do the greater part of the fund was in fact disposed of to private individuals and not to charities (Brown's brief, p. 9; Commissioner's brief, p. 11).

Of the remainder fund, however, approximately $200,000, plus the value of the necessary land, was appointed and distributed by the trustees to the erection of a memorial church. For this deduction was claimed, but although denied by the Commissioner and the Board of Tax Appeals, it was allowed by the Circuit Court, which reversed.

The Commissioner's brief (pp. 5-6, 14) relied upon and twice quoted the second paragraph of Article 47. Brown's reply brief (p. 3), referring to such paragraph and its precursor, stated it to be "only where a legatee or trustee

is empowered to divert the property from a charitable use to some other taxable use that charitable gifts will not be entitled to deduction." And he further there contended (p. 4) that "within the meaning of the Regulations the gift to the charities became effective when the appointment by the trustees was made."

The Third Circuit avoided the error made herein by the Second Circuit of applying a misinterpretation of the second paragraph of Article 47 as controlling the decision. It declared (p. 843) there could be no doubt that there was vested in the trustees a very broad discretion, and (p. 846):

> "* * * where a power of appointment is discretionary, the power being exercised relates back to the period of time of the settlement of the power. That is, in this case, to the date of the testator's death. Therefore, when the power was once exercised, the church took the gift from the settlor, the creator of the power, and not from the trustees themselves, for the reason that the deed created no estate in any one except through the exercise of the power to appoint under the terms of the deed. The tribunal, authorized to appoint, having exercised the power, their act relates back to the settlor and the estate passed from him, as the creator of the power, and not from the trustees."

Had the Court misapplied and misconstrued the second paragraph of Article 47 as controlling the case, as did the Court below herein, the trustees with merely their power of appointment, like the nephew and sister herein with theirs, would have erroneously been deemed to fall within the category of a transferee empowered to divert the fund, and instead of reversing the Board of Tax Appeals it is submitted affirmance by the Third Circuit would have resulted. The Court, however, avoided making such error.

In *Fidelity Trust Co.* v. *McLain* (C. C. E. Dist. Pa.), 113 Fed. 152 at 156, is cited with approval a Massachusetts Supreme Court case, *Balch et al., Trustees* v. *Shaw*, 174 Mass. 144, which presents a close analogy. There Massachusetts St. 1891 c. 425 exempted from an inheritance or legacy tax property passing "by will * * * or by deed, grant, sale, or gift, * * * to take effect * * * after the death of the grantor", if it passed "to or for charitable, educational or religious societies * * *", but subjected it to such tax if it passed to "any person in trust or otherwise", other than such societies. The grantor made a gift of a fund to take effect after death. The fund had a board, and the board was given power in its discretion to organize a charitable corporation as recipient of the gift. The power was so exercised. The question was whether the donee of the fund was the board, in which event the fund was subject to the tax, or the charitable corporation, in which event the fund was not taxable. The Court held the latter, stating (p. 148):

> "The persons composing the board of the Randall Fund were not themselves the donees. They had the power to direct the trustees to * * * cause the fund to be transferred * * * 'to any corporation * * * organized for * * * charitable purposes * * *.' This board had merely a power of appointment, and until such appointment was made and acted on there was no gift to anyone within the intent of the act. When the appointment was made, the effect was the same as if the name of the corporation had been written in the deed as the donee."

So here neither the sister nor the nephew was donee or legatee of the Lalor Fund. Its donee or legatee, upon the exercise of their designating power, was the corporate charitable foundation, or its Trustees, which was designated and to which such legacy was paid.

POINT II

The decision below is in substantial conflict with decisions of this Court establishing that as matter of public policy provisions as to tax deductions in respect of charitable legacies should be construed not narrowly but liberally.

The Circuit Court's misinterpretation and misapplication of the second paragraph of Article 47 of Regulations 80 as controlling upon this case is clearly shown in Point I.

It violated a well known principle of this Court requiring liberal construction of tax provisions regarding charitable gifts.

This Court has repeatedly declared that statutes allowing the deduction for tax purposes of charitable bequests represent liberalizations of the law in the taxpayer's favor, are "begotten from motives of public policy," and accordingly should not be narrowly construed.

> *Old Colony Trust Co.* v. *Commissioner,* 301 U. S. 379 at 383, 384;
> *Helvering* v. *Bliss,* 293 U. S. 144, at 150, 151;
> *United States* v. *Provident Trust Co.,* 291 U. S. 272 at 285, 286.

So thoroughly well established is this rule that further quotations are deemed unnecessary. The rule is enunciated, however, in the cases above cited, at the respective pages noted.

In conjunction with this rule should be mentioned the further principle that the language involved in such tax provisions should be given, not a strained, unnatural, un-

reasonable interpretation such as the Circuit Court attached to the paragraph in question, but its plain, ordinary and commonly understood meaning.

United States v. *Merriam*, 263 U. S. 179 at 187, 188.

Even if there were constructional doubts in this connection, which it is submitted there are not, they should have been resolved by the Court below in favor of deduction of the charitable legacy.

Gould v. *Gould*, 245 U. S. 151 at 153;
Lucas v. *Mercantile Trust Co.* (C. C. A. 8th), 43 Fed. (2d) 39 at 43.

The Circuit Court failed to observe and apply these principles, not only in its misapplication of Article 47's second paragraph, but also in failing to consider and apply in the petitioners' favor the first paragraph of the Article. Such first paragraph, which is printed in the foregoing petition at page 4, provides in effect that where a legacy is dependent upon the performance of some act or the happening of some event in order to become effective, the act must actually be performed or the event actually occur before a deduction will be allowed.

Although the Article thus allows for the completion of a charitable bequest by some act or event subsequent to a testator's death, no specific time limitation is provided within which such act must be performed or such event occur. Accordingly, pursuant to established principles of statutory construction, Article 47 must reasonably be construed to provide for and allow a "reasonable" time. Article 43 of Regulations 80 (1937 edition) provides that the Federal Estate Tax return in respect of a testator's estate does not have to be filed until one year from the date of

death, and Article 69 of the same Regulations provides that an extension of six months may be obtained beyond such one year period, with the further right to file supplemental information even after such extension. Consequently, the various facts relative to the valuation of a gross estate and possible statutory deductions therefrom need not formally be presented until twelve or even eighteen months after the date of death.

In the present case, by virtue of the provisions of the testator's Will, the exercise of the power of appointment necessarily had to be within one year of probate, and it was not only exercised within such limited period but was exercised, and payment made accordingly, long before the Estate Tax was the subject of a 90-day letter.

It is therefore submitted that the necessary performance was also within the time impliedly contemplated by the first paragraph of Article 47, and that the deduction claimed by the petitioners should have been allowed by the Court below as matter of law.

POINT III

The decision below is also in conflict with the policy of this Court as applied to the general subject of the certainty or uncertainty of charitable legacies, and the important question presented in this case should be passed upon by this Court and in the favorable light of such policy.

Having declared its decision controlled by the second paragraph of Article 47, and having proceeded erroneously to apply and construe said paragraph in violation of established public policy, the Circuit Court superimposed upon

such error the further error, which flowed naturally from the first, of declaring the legacy to The Lalor Foundation, Inc., too uncertain to constitute a charitable gift for the purpose of tax deduction.

This constituted a further violation of the public policy enunciated by this Court, apart from being a violation of the constructional rule mentioned in Point II.

On the question of the certainty or uncertainty of charitable legacies this Court in effect has held that where there is a possibility of a gift not going to charity, the question should be viewed in a liberal and practical manner and not narrowly or theoretically, and that where, under all the surrounding circumstances so regarded, such possibility is remote, the right of tax deduction should be deemed not defeated.

Ithaca Trust Co. v. *United States,* 279 U. S. 151.

In that case a will left a life estate to the testator's wife, with the remainder in trust to charity. The wife, however, was given the right to invade principal, thereby rendering the charitable gift uncertain. This Court held, however, that the possibility was remote and that there was a right to tax deduction, stating (p. 154):

> "There was no uncertainty appreciably greater than the general uncertainty that attends human affairs."

This language was quoted with approval in a similar case, *Lucas* v. *Mercantile Trust Company* (C. C. A. 8th), *supra,* 43 Fed. (2d) 39, at 44, and it was declared (p. 43):

> "* * * The desire of the testator is apparent. His humane purposes, after providing amply for his widow, to assist unfortunate and afflicted humanity

> should not be destroyed by a strained and almost ridiculous construction of the Will.
>
> • • • • • •
>
> Doubts in taxing statutes should be resolved in favor of the beneficiary, *Gould* v. *Gould,* 245 U. S. 151 * * * and funds set aside by a charitably inclined testator entirely for the benefit of poor, crippled, and orphaned children, and for the support of the indigent blind, the deaf, the dumb, and the aged poor, should not be taken for taxes unless such is the clear intent of the law."

This Court, it is submitted, is opposed to having its policy in respect of charitable deductions subverted by arbitrary determinations.

> *United States* v. *Provident Trust Co.,* 291 U. S. 272 at 285, 286.

In the present case there are conjoined two factors believed to be conclusive in favor of deductibility, (a) that any possibility of the charitable legacy lapsing was precluded by timely exercise of the sister's and nephew's power of appointment within the terms of both the Will and of the first paragraph of Article 47; and (b) that as a practical matter even the original theoretical possibility was particularly remote under the circumstances which surrounded the legacy.

The general charitable intent of the testator herein was clear. He specifically gave and bequeathed the legacy to educational institutions as a class. It was not necessary for him to designate the particular institution within such class. He could properly leave such particularization to others, as he did by making the bequest to such educational institution as his sister and nephew might appoint. And when they exercised such power, as they properly did, their action related back to the death of the testator and in

legal effect was his act of testamentary disposition. Not only was the exercise of their power in accordance with his wishes; it flowed from and was done pursuant to the Will, from which alone derived the power to make it. Neither the sister nor the nephew had any estate in the fund; none was created in them or passed to or from them. The legacy passed from the testator, who created the estate, to the legatee, The Lalor Foundation, Inc., to which it was paid over accordingly.

The narrow question of the theoretical possibility of lapse is academic, in the face of such accomplished fact, and there is no valid reason why deduction should not be allowed where a charitable gift has not only actually passed to a conceded charity, but has so passed, as here, upon exercise of a power performed within a reasonable period after the testator's death and which relates back to his death.

Viewed practically, moreover, and in such manner as to conform to the policy which motivates this Court in respect of charitable deductions, it is submitted that even such theoretical possibility was remote, and that a mere remote possibility should not be deemed sufficient to defeat deductibility.

For as shown by the surrounding circumstances, as to which there is no dispute, it had long been the testator's intention to make a gift of this nature. His sister and nephew had been in intimate contact with him on the subject of his plans, both before and after his execution of the Will.

Both sister and nephew were outstanding in the educational field. She had been in it for fifty years, for twenty-three of these associated with the Federal Department of

Education, and she held various honorary degrees. The nephew held a doctorate in chemistry, had studied it extensively here and abroad, had been on the faculties of the Massachusetts and California Institutes of Technology, and had been offered professorships at the former and at Harvard and the deanship of engineering at Carnegie Institute of Technology (R. 59).

In consideration of their character, attainments in the field the testator wished to benefit, and intimacy with the testator and his intentions, the likelihood, if any, that they might permit the legacy to lapse, by inaction on their part in respect of the power which the Will gave them, was extremely remote.

Only, indeed, by applying a most narrow, impractical and illiberal test could it be assumed there was any real possibility of their acting other than they in fact did.

To such extent, therefore, as the Court below may be deemed to have applied any such test, it is submitted it acted with clear error in so doing, in addition to its other errors.

This Court, it is believed, will wish itself to pass upon this case, involving as it does a federal question of important social consequence. The question should not be left to inter-circuit conflict below and, as far at least as the Second Circuit is concerned, controlled by erroneous interpretations opposed to considerations of established public policy.

Charitable gifts should be encouraged instead of discouraged, but such gifts will be discouraged if estates are to be taxed in respect of gifts which are admittedly charitable.

The development of a trend of that nature would be particularly deplorable, it is submitted, in the world's present troubled state, and especially so in respect of gifts for chemical research, a field so important to national security and welfare.

CONCLUSION

For the reasons stated above, it is submitted that the petition for writ of certiorari should be granted.

Dated: New York, N. Y., May 26, 1941.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 109

CHARLES LALOR BURDICK AND CHEMICAL BANK & TRUST COMPANY, TRUSTEES OF THE LAST WILL AND TESTAMENT OF WILLARD A. LALOR, DECEASED, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 24–32) is reported in 40 B. T. A. 1040. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 96–99) is reported in 117 F. (2d) 972.

JURISDICTION

The order of the Circuit Court of Appeals was entered February 27, 1941 (R. 99). The petition

for a writ of certiorari was filed May 27, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent bequeathed certain sums to the trustees of such educational institutions as his sister and nephew might select but provided that if the selection were not made within one year after probate the charitable bequests should lapse and become part of the residuary estate bequeathed to private individuals. There was no selection by the sister and nephew prior to his death, but within one year thereafter they organized an incorporated foundation for educational purposes to which they directed the executors to pay the bequests.

The question is whether the amounts are deductible from the gross estate under Section 303 (a) (3) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The facts as stipulated (R. 69–92) and as found by the Board (R. 24–30), so far as necessary here, may be summarized as follows:

Willard A. Lalor died testate October 9, 1934 (R. 25). His will was executed November 19,

1930 (R. 26), and probated March 20, 1935 (R. 70). By it Lalor bequeathed $100,000 to trustees of an educational institution which his sister, Anna Lalor Burdick, might select, and $300,000 to one which his nephew, Charles Lalor Burdick (son of Anna Lalor Burdick) might select (R. 26–27). Among other things, the decedent in his will declared that he had discussed his motives and expectations in respect of the establishment and maintenance of the funds above mentioned with his sister and nephew and that it was his intention to request them to make the selection of the educational institution at that time. The will further provided that, in the event the selection were made, the executors were to pay the bequests to such institution in the manner and upon such terms to be set forth in the written instrument to be filed with the will (R. 27). And finally, the will contained the following provision with regard to these bequests (R. 28):

> In the event no instructions in writing given by *Anna Lalor Burdick* and/or *Charles Lalor Burdick* shall have been so endorsed and filed with my Will and in the event my Executor hereinafter named shall not receive within one year after the date upon which my Will shall have been probated from either of them, a notice in writing designating the educational institution or institutions to the Trustees of which my Executor shall make payment of the bequests herein made, I direct that the legacy

> in respect of which there shall have been such a failure of selection shall lapse and the amount thereof shall be added to and form a part of my residuary estate.

The residuary clause of the will set up a trust for the benefit of the testator's sister, Anna Lalor Burdick, her son, Charles Lalor Burdick, and other individuals (R. 28, 74–79).

Within a year after the probate of the will, an educational institution, known as the Lalor Foundation, Inc., was organized exclusively for scientific and educational purposes, and the executors directed to pay the $400,000 in question to this institution. The amount was so paid to it by the executors on April 10, 1936 (R. 28–29).

The executors claimed a deduction from the value of the gross estate of the amount so paid as a charitable bequest of the decedent (R. 71). The Commissioner of Internal Revenue disallowed the deduction and, on the basis of that disallowance and other adjustments not here involved, determined a deficiency of $149,199.67 in estate taxes (R. 14–17, 20–24). The Board of Tax Appeals sustained the Commissioner's determination (R. 33), and the court below affirmed the Board's decision (R. 99).

ARGUMENT

The only question involved in this case is whether a bequest for educational purposes was made within the meaning of the statute. The

deduction for such gifts is limited by the statute to cases where the decedent has used sufficiently specific language so that the bequest may not be diverted to other uses. The petitioners rely principally upon asserted conflicts with *Levey* v. *Smith,* 103 F. (2d) 643 (C. C. A. 7th), certiorari denied, 308 U. S. 578, and *Brown* v. *Commissioner,* 50 F. (2d) 842 (C. C. A. 3rd).

Levey v. *Smith, supra,* is clearly not in point. In that case there was a definite testamentary bequest to a fraternal lodge and the deduction was denied because the lodge was not engaged exclusively in charitable work. Petitioners say that because the deduction in that case turned upon the activities of the lodge the deduction here should turn upon the activities of the Lalor Foundation, Inc., which was admittedly organized exclusively for scientific and educational purposes. The activities of the lodge were controlling in the *Levey* case because the decedent made a definite bequest to the lodge. Since the decedent here did not make a definite bequest to the Foundation, it is obvious that the question in the *Levey* case does not arise here. The question here is whether the decedent dedicated his gift to an educational use, not whether it was actually put to such use.

In *Brown* v. *Commissioner, supra,* the will directed the trustees to use the trust fund as they saw best, "bearing in mind the ideals of said Settlor with reference to the ownership of money

and to the ideas on the general subject as expressed by him from time to time." (P. 843.) The trustees expended part of the trust fund for a church. The decision turned upon the conclusion of the Circuit Court of Appeals that the decedent had during his lifetime clearly expressed to the trustees his desire that the church be built and that they were thus legally obligated to carry out his wishes (50 F. (2d) at page 845). In other words, the court held that the decedent's gift was definitely limited to the use to which it was actually put. No similar limitations were found to have been imposed upon the decedent's sister and nephew in this case and it is clear that they could have properly added the funds to the residuary estate from which they were both to receive annuities.

It is settled that a deductible bequest to charity must be absolute at the time of death and that there must be no contingency or uncertainty which may prevent the gift from taking effect. *Knoernschild* v. *Commissioner,* 97 F. (2d) 213 (C. C. A. 7th); *Mississippi Valley Trust Co.* v. *Commissioner,* 72 F. (2d) 197 (C. C. A. 8th), certiorari denied, 293 U. S. 604; *Davison* v. *Commissioner,* 81 F. (2d) 16 (C. C. A. 2d).

The general principles relied upon in petitioners' Points II and III are clearly not a sufficient reason for setting aside this settled rule.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition should be denied.

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JUNE 1941.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 303. [As amended by Section 807 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Sections 403 and 406 of the Revenue Act of 1934, c. 277, 48 Stat. 680.] For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a citizen or resident of the United States, by deducting from the value of the gross estate—

* * * * *

(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the

prevention of cruelty to children or animals. If the tax imposed by section 301, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate; and

* * * * *

(U. S. C., Title 26, Secs. 412, 450, 461, 462, 463.)

Treasury Regulations 80 (1934 ed.):

ART. 47. *Conditional bequests.*—If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 109

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Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR THE PETITIONERS

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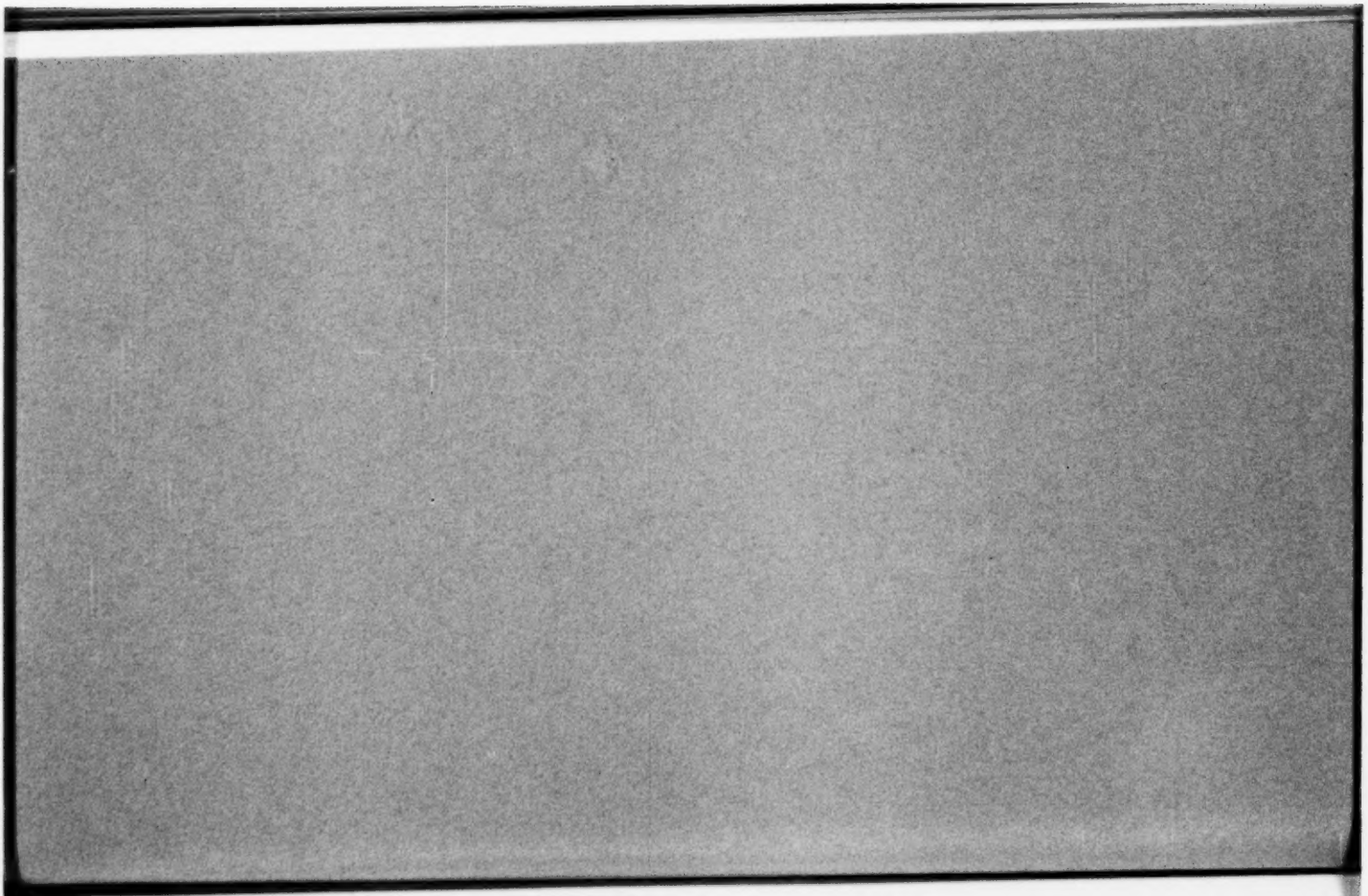

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REPLY BRIEF FOR THE PETITIONERS

I.

The inadvertent error on page 5 of the Respondent's brief as to the Petitioners' statement respecting *Levey* v. *Smith*.

The respondent's opposing brief at page 5 unfortunately though inadvertently misconstrues the petitioners' stated position in respect of *Levey* v. *Smith* (C. C. A. 7th), 103 Fed. (2d) 643, c. d. 308 U. S. 578. The respondent mistakenly states (p. 5):

> "Petitioners say that because the deduction in that case turned upon the activities of the lodge the deduction here should turn upon the activities of the Lalor Foundation, Inc., which was admittedly organized exclusively for scientific and educational purposes."

Petitioners did not say this.

The *Levey* case, which the petitioners briefly discuss on pages 14 to 15 of their petition-brief, is there referred to as showing that the question of power to use a fund for and divert it to a non-charitable use, under Section 303(a)(3) of the Revenue Act of 1926, as amended, and under the second paragraph of Article 47 of Regulations 80, is a question of power in the *transferee of the fund,* and not, as the Court below erroneously construed it, a question of power in the *holder of a power of designation* or appointment.

II.

The cases relied upon on page 6 of the Respondent's brief are clearly distinguishable, and the statement there made in connection with their citation is submitted to be inaccurate.

The three cases cited on page 6 of the respondent's opposing brief are submitted all to be clearly distinguishable from the present case, and it is submitted further that the statement immediately preceding such three citations is inaccurate.

As shown in Point III of petitioners' brief (petition—brief, pp. 20 *et seq.*), the legacy should not have been held an uncertain gift defeating deductibility.

In *Knoernschild* v. *Commissioner* (C. C. A. 7th), 97 Fed. (2d) 213, there was a testamentary gift to a daughter for life, and on her death over to charities, but the daughter was given power in her life to direct the trustees to pay out any part of the fund to provide for her relatives. Had a charitable deduction been allowed, at any time thereafter during her life the trustees, on the daughter's direction, could have diverted the fund to such private use notwithstanding such deduction.

In *Mississippi Valley Trust Co.* v. *Commissioner* (C. C. A. 8th), 72 Fed. (2d) 197, c. d. 293 U. S. 604, the testator's will stated he made no charitable bequests, but preferred to have his sons make charitable donations in their sole discretion. Obviously there was no testamentary charitable gift, and hence no case for a charitable deduction.

In *Davison* v. *Commissioner* (C. C. A. 2d), 81 Fed. (2d) 16, there was a testamentary trust for a wife's life, with a gift over on her death to her private appointees, and an alternative gift over, by condition subsequent in the event of her failure to appoint, to charities. Had deduction been allowed, it would have been in theory as for a charitable legacy, but in actuality for a private legacy which could have become charitable only by operation of a condition subsequent at the life tenant's death, perhaps many years later.

It is clear that in such cases charitable deductions should not be allowed.

In the present case, however, the situation is wholly different. Here there is an actual charitable legacy, and the theoretical possibility of its defeat by condition subsequent (a) was limited to a brief period of one year,

(b) was in fact remote under the particular circumstances disclosed, and (c) was wholly precluded by a designation which related back to the testator's death.

The charitable legatee, indeed, had actually received the legacy before the Commissioner asserted its taxability. Even then there was left no possibility of its becoming non-charitable.

To deny deductibility to such a charitable legacy is believed to be clearly erroneous.

This case thus presents an important issue of liberal public policy which this Court should pass upon and clarify, quite aside from the conflict disclosed in respect of Article 47 and more particularly the second paragraph thereof, which the Court below erroneously held to be the controlling factor in the case.

The petition for writ of certiorari should be granted.

Dated, New York, N. Y., July 1, 1941.

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